REPORTS OF CASES

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AND THE

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OF THE

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Volume 133

VILLAGE LEAGUE TO SAVE INCLINE ASSETS, INC., A NEVADA NONPROFIT CORPORATION, ON BEHALF OF THEIR MEMBERS AND OTHERS SIMILARLY SITUATED; DEAN R. INGEMANSON, TRUSTEE OF THE LARRY D. & MARYANNE B. INGEMANSON TRUST; DEAN R. INGEMANSON, INDIVIDUALLY AND AS TRUSTEE OF THE DEAN R. INGEMANSON TRUST; J. ROBERT ANDERSON; LES BARTA; KATHY NELSON, INDIVIDUALLY AND AS TRUSTEE OF THE KATHY NELSON TRUST; ANDREW WHYMAN; ELLEN BAKST; JANE BARNHART; CAROL BUCK; DANIEL SCHWARTZ; LARRY WATKINS; DON & PATRICIA WILSON; AND AGNIESZKA WINKLER, APPELLANTS, *v.* THE STATE OF NEVADA, BOARD OF EQUALIZATION; WASHOE COUNTY; WASHOE COUNTY TREASURER; AND WASHOE COUNTY ASSESSOR, RESPONDENTS.

No. 63581

January 26, 2017 388 P.3d 218

Appeal from a district court order dismissing a petition for judicial review of a State Board of Equalization reappraisal decision. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Reversed and remanded with instructions.

Norman J. Azevedo, Carson City; *Snell & Wilmer, L.L.P*, and *Suellen Fulstone*, Reno, for Appellants.

Adam Paul Laxalt, Attorney General, and *Dawn Buoncristiani*, Deputy Attorney General, Carson City, for Respondent Nevada State Board of Equalization.

Christopher J. Hicks, District Attorney, and *Herbert B. Kaplan*, Deputy District Attorney, Washoe County, for Respondents Washoe County, Washoe County Treasurer, and Washoe County Assessor.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

This appeal is a continuation of a dispute between many taxpayers from the Incline Village and Crystal Bay areas of Washoe County and respondent Nevada State Board of Equalization concerning the State Board's failure to equalize property values as required by NRS 361.395 for tax years 2003-04, 2004-05, and 2005-06. In this appeal, we must determine whether the district court erred when it dismissed a petition for judicial review of the State Board's interlocutory administrative order and whether the district court's decision is appealable to this court. Additionally, we are asked to determine whether the interlocutory administrative order issued by the State Board, requiring reappraisals of properties around Incline Village and Crystal Bay for the tax years in question, exceeded the Board's statutory authority by seeking to equalize property values nearly a decade before the date of the order.

Initially, we conclude that this court has jurisdiction to consider the district court's dismissal of the petition for judicial review. We further conclude that the district court erred when it dismissed the petition for judicial review because the State Board exceeded its statutory authority to order reappraisals pursuant to NRS 361.395. Accordingly, we reverse the district court order dismissing the petition for judicial review and instruct the district court to grant, in part, the petition for judicial review and vacate the State Board's interlocutory administrative order directing reappraisals of the prop-

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter. THE HONORABLE LIDIA S. STIGLICH, Justice, did not participate in the decision of this matter.

erties in the Incline Village and Crystal Bay areas for the tax years in question.

FACTS AND PROCEDURAL HISTORY

Appellant Village League to Save Incline Assets, Inc., filed a class action complaint in the district court in 2003 alleging, in relevant part, that the State Board failed to carry out its constitutional obligation to equalize property valuations in Incline Village and Crystal Bay and sought damages and declaratory relief directing the State Board to conduct the annual equalization of property values required by NRS 361.395. Respondents Washoe County, Washoe County Treasurer, and Washoe County Assessor (collectively, Washoe County) were also named in that action. Because Village League failed to administratively challenge the property valuations before filing the complaint, the district court dismissed the complaint, and Village League appealed the district court's decision in 2004 (2004 appeal).

Before the 2004 appeal was decided, in opinions published in 2006 and 2008 arising from separate cases, this court determined that assessment methods used in 2002 to value properties at Incline Village and Crystal Bay for real estate tax purposes were unconstitutional. *See State ex rel. Bd. of Equalization v. Barta*, 124 Nev. 612, 627, 188 P.3d 1092, 1102 (2008); *State ex rel. Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1416, 148 P.3d 717, 726 (2006). In *Barta* and *Bakst*, this court concluded, as a remedy, that because property is physically reappraised once every five years and the assessment methods used in 2002 were unconstitutional, the taxable values for the unconstitutionally appraised properties were void for the tax years beginning in 2003-04 and ending in 2007-08. *Barta*, 124 Nev. at 623-24, 188 P.3d at 1100; *Bakst*, 122 Nev. at 1416, 148 P.3d at 726. As a result, property taxes in those years were to be based on the taxable values previously established for the 2002-03 tax year. *Barta*, 124 Nev. at 628, 188 P.3d at 1103 (holding invalid any assessments based on the invalid 2002 taxable values); *Bakst*, 122 Nev. at 1416-17, 148 P.3d at 726 (invalidating the 2003-04 tax year assessments).

As to Village League's 2004 appeal, this court reversed in part the district court's dismissal of the declaratory relief claim seeking statutory equalization and remanded the case to the district court for it to decide the viability of the claim. *See Village League to Save Incline Assets, Inc. v. State ex rel. Dep't of Taxation*, Docket No. 43441 (Order Affirming in Part, Reversing in Part and Remanding, March 19, 2009). On remand, Village League filed an amended complaint and petition for a writ of mandamus, asserting that the State Board was required to ensure a uniform and equal rate of as-

sessment statewide.[2] The district court denied the petition, and Village League again appealed.

On appeal, this court again reversed in part the district court's decision. *See Village League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, Docket No. 56030 (Order Affirming in Part, Reversing in Part and Remanding, February 24, 2012). The case was remanded, and the district court subsequently issued a writ of mandamus ordering the State Board to hold a hearing and fulfill its equalization duty for all tax years in which unconstitutional methodologies were used, beginning with the 2003-04 tax year. The State Board was also required to report back to the district court regarding its compliance with the writ.

In front of the State Board, Village League argued that all property owners in the Incline Village and Crystal Bay areas were entitled to the same remedy provided to the taxpayers in *Bakst* and *Barta*, which involved setting property values to the last constitutionally assessed level and issuing refunds. The State Board found that some properties located in the Incline Village and Crystal Bay areas were valued in 2003-04, 2004-05, and 2005-06 using methods that were unconstitutional but there was no evidence that these unconstitutional methods were used outside of the Incline Village and Crystal Bay areas for the tax years at issue.

The State Board concluded that, with the exception of NRS 361.333 concerning equalization by the Nevada Tax Commission, there were no statutes or regulations defining equalization by the State Board prior to 2010. Ultimately, the State Board determined that although no statewide equalization was required, regional equalization in the Incline Village and Crystal Bay areas was. Relying on a 2010 regulation, the State Board issued an interlocutory administrative order directing reappraisals of all properties in the Incline Village and Crystal Bay areas in which unconstitutional methodologies were used for the disputed tax years (hereinafter, Equalization Order).

As required, the State Board submitted its report to the district court indicating that it had complied with the writ of mandamus. Village League objected to the report, arguing that the Equalization Order did not comply with the writ.[3] Village League also filed

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[2]Appellants Dean R. Ingemanson, Trustee of the Larry D. & Maryanne B. Ingemanson Trust; Dean R. Ingemanson, individually and as Trustee of the Dean R. Ingemanson Trust; J. Robert Anderson; Les Barta; Kathy Nelson, individually and as Trustee of the Kathy Nelson Trust; and Andrew Whyman were added to the amended complaint/petition as plaintiffs/petitioners. In this appeal, we collectively refer to these appellants and appellant Village League to Save Incline Assets, Inc., as Village League.

[3]We do not address Village League's arguments regarding its objection to the State Board's report because our reversal of the district court's order dismissing the petition for judicial review is dispositive.

a petition for judicial review in the district court challenging the Equalization Order and the State Board's power to order reappraisals of properties for the 2003-04, 2004-05, and 2005-06 tax years.[4] Further, the taxpayers from the *Bakst* and *Barta* cases (collectively, Bakst intervenors),[5] whose property values for the disputed tax years had already been established, filed a motion to intervene in the district court action, arguing that the Equalization Order directing reappraisal of their properties threatened the previous final judgments. The district court granted the motion to intervene.

The State Board moved to dismiss the petition for judicial review. The district court granted the motion because it concluded that the Equalization Order was interlocutory and review of the State Board's final decision would provide an adequate remedy. Village League appeals the dismissal of the petition for judicial review, arguing that the State Board does not have the authority to order reappraisals. The Bakst intervenors appeal, making issue and claim preclusion arguments.

DISCUSSION

I.

As a threshold matter, the State Board argues that the district court properly refused to review the Equalization Order because it was a legislative action of general applicability, not an adjudicative action. The State Board and Washoe County also argue that this court lacks jurisdiction to consider this appeal because the district court did not enter a final, appealable judgment in a contested case. Finally, they maintain that neither Village League nor the Bakst intervenors are aggrieved parties because the reappraisal outcomes are unknown and the property values may not increase.

A.

As an alternate basis for upholding the dismissal order, the State Board asserts that the equalization decision was not an adjudicative action subject to judicial review. Village League and the Bakst intervenors argue, however, that this court has already determined that equalization decisions by the State Board are adjudicative quasi-judicial functions, not legislative. *See Marvin v. Fitch*, 126 Nev. 168, 232 P.3d 425 (2010). The State Board attempts to distinguish *Marvin* by arguing that it was decided in the context of hearing a valuation appeal from a county board.

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[4]Only three years are at issue in this case because the State Board dealt with the remaining years outside of this case.

[5]The Bakst intervenors include appellants Ellen Bakst, Jane Barnhart, Carol Buck, Daniel Schwartz, Larry Watkins, Don & Patricia Wilson, and Agnieszka Winkler.

In *Barta*, we observed that the State Board has two "separate functions: equalizing property valuations throughout the state and hearing appeals from the county boards." *Barta*, 124 Nev. at 628, 188 P.3d at 1102. However, we did not resolve whether the Board was engaged in a legislative or quasi-judicial function in that case as we did in *Marvin*. In *Marvin*, the underlying controversy did not concern the State Board hearing an appeal from a county board; rather, the State Board declined to equalize the taxpayers' property valuations because they failed to first petition the appropriate county board as required under NRS 361.360. *Id*. at 172, 232 P.3d at 428. Thus, this court was considering the equalization process in general, not a specific appeal from a county board, when deciding *Marvin*. *Id.* at 173, 232 P.3d at 429 ("Therefore, we must determine whether [the State Board's] decision and the equalization process in general are afforded absolute immunity."). Furthermore, this court stated that "NRS Chapter 361 clearly demonstrates the Legislature's intent that the equalization process be open to the public and that the individual taxpayer be given notice of and the opportunity to participate in the State Board's valuation of his or her property." *Id*. at 179, 232 P.3d at 432. Thus, *Marvin* is not inapposite to this case as the State Board suggests.

In *Marvin*, we concluded "that the State Board is performing a quasi-judicial function when determining whether to equalize property valuations." 126 Nev. at 170-71, 232 P.3d at 427. This court reasoned that the function was quasi-judicial "because the equalization process requires the members to perform functions (fact-finding and making legal conclusions) similar to judicial officers, the process is adversarial, it applies procedural safeguards similar to a court, errors can be corrected on appeal, and the statutory scheme retains State Board members' independence from political influences." *Id.* at 176, 232 P.3d at 430. We also noted the adversarial nature of the State Board's annual meetings because they are open to the public, permit individual taxpayers to challenge a property tax assessment, require public notice, and allow taxpayers to be represented by an attorney. *Id.* at 177, 232 P.3d at 431.

Arguing that the Equalization Order in this case was a legislative action rather than an adjudicatory function, the State Board suggests that this case should be viewed differently. But this argument disregards the fact that the district court ordered the State Board to provide notice, hold hearings, and fulfill its statutorily mandated equalization duties for tax years beginning with the 2003-04 tax year, nearly a decade before. The hearings in front of the State Board were noticed through publication in numerous newspapers, and taxpayers throughout the state were allowed to present their individual and regional grievances. Testimony was offered by sworn witnesses, and documents were offered into evidence. Ultimately, the State Board rendered a decision, including findings of facts and

conclusions of law determining the rights of the parties before it. Consistent with our decision in *Marvin*, we conclude that the State Board was engaged in a quasi-judicial function.

B1.

The State Board and Washoe County also maintain that this court lacks jurisdiction to hear this appeal because the district court did not enter a final judgment in a contested case. We disagree.

"A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." NRAP 3A(a); *see also* NRS 233B.150 ("An aggrieved party may obtain a review of any final judgment of the district court by appeal to . . . the Supreme Court . . . ."). "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered" constitutes an appealable order. NRAP 3A(b)(1). "An order granting or denying a petition for judicial review . . . is an appealable final judgment if it fully and finally resolves the matters as between all parties." *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013). "To be aggrieved, a party must be adversely and substantially affected by the challenged judgment." *Id*.

The district court dismissed Village League's petition for judicial review of the Equalization Order without reviewing the merits of the order. While the Equalization Order itself did not determine how the State Board would equalize property values, the district court's dismissal of the petition was a final judgment because it effectively resolved the petition for judicial review and ended the parties' ability to challenge the State Board's power to order reappraisals of their properties in order to accomplish that equalization.

B2.

As discussed in more detail below, the statutory grievance process allows only individual property owners to challenge the State Board's final equalization decision regarding property values, if those valuations increased. But the statutory scheme does not provide a remedy to review the State Board's authority to order reappraisals. *See* NRS 361.356(1)(a); NRS 361.357(1)(a); NRS 361.395(2)(a). Although the Equalization Order was interlocutory, NRS 233B.130(1) allows an aggrieved party to seek judicial review from "[a]ny preliminary, procedural or intermediate act or ruling by an agency in a contested case" when "review of the final decision of the agency would not provide an adequate remedy."[6] Pursuant

[6]Washoe County argues that the case is not ripe for review because the Equalization Order is not final and there is thus no concrete harm to be adjudicated. However, we conclude that this argument is without merit because NRS 233B.130(1) specifically provides for review of a nonfinal order when there is no "adequate remedy" available.

to NRS 233B.032, a contested case is "a proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." Accordingly, because the district court's dismissal of their challenge to the Board's Equalization Order ended Village League's right to challenge the Board's authority to order reappraisals, and the Bakst intervenors have raised questions concerning issue and claim preclusion over remedies already obtained in prior litigation, all parties are aggrieved, and we have jurisdiction to consider this appeal.

C.

The district court determined that an adequate remedy exists because individual taxpayers "who disagree with the valuations of their property . . . [can] challeng[e] those valuations through the normal and standard process for challenging tax assessments." Village League and the Bakst intervenors argue that the normal and standard process is not available to any property owner whose valuation has remained static or lowered, implicating due process concerns.

Individual challenges to county board assessments are permitted by statute. The statutory process begins with notice of the tax roll being completed "[o]n or before January 1 of each year." NRS 361.300(1). The taxpayer has until January 15 to appeal the valuation to the appropriate county board. NRS 361.356(1)(a); NRS 361.357(1)(a). Prior to the hearing, the property owner can obtain information from the assessor, such as "a copy of the most recent appraisal of the property, including, without limitation, copies of any sales data, materials presented on appeal to the county board of equalization or State Board of Equalization and other materials used to determine or defend the taxable value of the property." NRS 361.227(8). A taxpayer who disagrees with the decision of a county board may appeal to the State Board "on or before March 10" of each year. NRS 361.360(1).

Alternatively, taxpayers can directly challenge State Board assessment decisions in certain situations. When the State Board engages in its equalization function pursuant to NRS 361.395(1), a different appeals process is implicated. If a property valuation increases above the assessed value in the county tax roll, the State Board must, upon 10 days' notice,[7] hold a hearing where the taxpayer can "submit proof" that the valuation is incorrect. NRS 361.395(2)(a). Notably, a taxpayer may not challenge an assessment pursuant to NRS 361.395(2)(a) when the valuation is decreased or remains the same.

[7]NRS 361.395(2)(a) was amended in 2013 to require 30 days' notice in this instance, applicable to property valuation increases proposed by the State Board in fiscal years beginning on or after July 1, 2013. *See* 2013 Nev. Stat., ch. 481, §§ 1, 2, at 2897-98.

Under the State Board's Equalization Order, the Washoe County Assessor was required "to reappraise all residential properties located in Incline Village and Crystal Bay to which an unconstitutional methodology was applied to derive taxable value during the tax years 2003-2004, 2004-2005, and 2005-2006." Additionally, the Washoe County Assessor was prohibited from "chang[ing] any tax roll based on the results of the reappraisal until directed to do so by the State Board." Finally, the State Board ordered the Washoe County Assessor to "separately identify any parcel for which the reappraised taxable value is greater than the original taxable value, along with the names and addresses of the taxpayer owning such parcels to enable the State Board to notify said taxpayers of any proposed increase in value."

The State Board was clearly attempting to engage in its equalization function pursuant to NRS 361.395(1) when it ordered the reappraisals. As such, an appeal directly to the State Board would be the only way for a taxpayer to challenge the reappraised taxable value. Pursuant to NRS 361.395(2)(a) and the Equalization Order, however, only taxpayers whose property valuations rise as a result of the reappraisal process are entitled to a hearing. But this remedy fails to take into consideration the remedies already afforded the Bakst intervenors and the affect those remedies have on the equalization process for the region.

Further, the State Board's jurisdiction is limited to equalizing property values and hearing appeals from county board valuations, not determining matters of law unrelated to valuation. *See Marvin*, 126 Nev. at 175, 232 P.3d at 430. Therefore, the Bakst intervenors whose property valuations increase upon reappraisal, thus entitling them to a hearing pursuant to NRS 361.395(2)(a), would not be allowed to raise their issue or claim preclusion arguments to the State Board. Accordingly, we conclude that review of the State Board's final decision is not an adequate remedy for Village League or the Bakst intervenors.[8] Because we conclude that the Equalization Order was a ruling in a contested case and Village League and the Bakst intervenors did not have an adequate remedy, we further conclude that the district court erred by not reviewing the Equalization Order pursuant to NRS 233B.130(1).

II.

Although the district court dismissed the petition before reaching its merits, Village League argues on appeal that NRS 361.395 does not provide the State Board with the power to order reappraisals. Additionally, Village League contends that the State Board unlawfully relied upon regulations adopted in 2010. The issue of the scope

[8]Based on our conclusion, we decline to reach the Bakst intervenors' preclusion arguments.

of the State Board's power pursuant to NRS 361.395 is a matter of statutory construction and a legal question which we review de novo. *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010).

A.

The State Board has no inherent power but is limited to the powers conferred by statute. *Nev. Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 955-56, 102 P.3d 578, 583-84 (2004). NRS 361.395(1)(a) authorizes the State Board to "[e]qualize property valuations in the State." NRS 361.395(1)(b) further mandates that the State Board

> [r]eview the tax rolls of the various counties as corrected by the county boards of equalization thereof and raise or lower, equalizing and establishing the taxable value of the property, for the purpose of the valuations therein established by all the county assessors and county boards of equalization and the Nevada Tax Commission . . . .

When conducting de novo review, we interpret clear and unambiguous statutes based on their plain meaning. *J.D. Constr.*, 126 Nev. at 375, 240 P.3d at 1039-40. Because the county boards establish the taxable property valuations, not the State Board, the State Board's authority when performing its equalization duties pursuant to NRS 361.395(1) is limited to reviewing the tax rolls that contain the property assessment values for all the counties.[9] After reviewing the tax rolls, the State Board must then adjust the taxable property values, if necessary, in order to equalize taxable values throughout the state. The equalization process

> involves an *adjustment of the value of property assessed* to conform to its real value. Thus, equalization is a process applied to certain taxpayers and their property by which the assessed value of a taxpayer's property is adjusted so that it bears the same relationship of assessment value to the true tax value as other properties within the same taxing jurisdiction.

84 C.J.S. *Taxation* § 701 (2010) (emphasis added) (footnote omitted). There is no language in NRS 361.395 that can even arguably

[9]The State Board argues against interpreting the statute as limiting its review to only the tax rolls, which do not provide the Board with enough information to properly equalize. The State Board focuses on the fact that assessment ratio studies, as provided for in NRS 361.333, are necessary for the State Board to consider when equalizing. We agree that the statute does not prohibit the State Board from reviewing other information available, such as assessment ratio studies, in carrying out its equalization function. However, we note that reviewing additional information such as an assessment ratio study during the equalization process differs entirely from ordering a county assessor to reappraise property valuations.

be construed as allowing the State Board to order a county to reappraise property values several years after the year of assessment. We therefore conclude that the plain language of NRS 361.395(1) does not provide the State Board with the authority to order reappraisals of property values.[10]

In 2010, the State Board adopted a regulation stating that it had the authority to "requir[e] the reappraisal by the county assessor of a class or group of properties in a county." NAC 361.665(1)(c). The State Board argues that this 2010 regulation applies retroactively to the tax years in question here, or, alternatively, at least provides guidance on the issue. The State Board also argues that this court must give deference to an administrative agency's reasonable interpretation of an enabling statute. Notably, in *Barta*, this court agreed "with the State Board's determination that the regulations [at issue] were *not* retroactive" to tax years that preceded the enactment of those regulations. 124 Nev. at 622, 188 P.3d at 1099 (emphasis added). We see no basis to apply the 2010 regulation, expressly or impliedly, to the tax years that precede its enactment.

Deference is given to an administrative agency's "interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute." *UMC Physicians' Bargaining Unit v. Nev. Serv. Emp. Union/SEIU Local 1107*, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (stating that when determining whether a regulation exceeds statutory authority, courts should consider whether statutory text speaks to the authority granted to the agency, and if not, whether the regulation is based upon a reasonable construction of the statute). As we have concluded, the plain language of NRS 361.395 does not confer on the State Board authority to order reappraisals. Because NAC 361.665(1)(c)'s purported grant of power "is [not] within the language of" NRS 361.395, *UMC Physicians' Bargaining Unit*, 124 Nev. at 89, 178 P.3d at 712, or any other statutory provision, we conclude that the State Board's interpretation is unreasonable and in excess of its statutory authority.[11]

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[10]In further support of this conclusion, we note that the statutory scheme of NRS Chapter 361 provides a strict procedural timeline taxpayers must adhere to when challenging county board and State Board assessment valuation decisions. *See* NRS 361.300; NRS 361.356(1)(a); NRS 361.360(1)-(2); NRS 361.410. Were we to conclude that NRS 361.395(1) permitted the State Board to order reappraisals, there is no method by which a taxpayer could challenge the county board's decision. For example, if a taxpayer's taxable property value was increased based on the reappraisal ordered by the State Board during equalization, that taxpayer would not be afforded an appeal to a county board first, as is the normal process following assessment.

[11]Because we determine that the State Board lacks authority to order reappraisals, we need not reach Village League's other arguments raised on appeal, including whether (1) the Equalization Order violates the constitutional

CONCLUSION

We conclude that NRS 361.395 does not provide the State Board with authority to order reappraisals and the 2010 regulation purporting to provide the State Board with such authority does not apply retroactively to the tax years at issue in this case. Further, as the interlocutory order affected appellants' rights and was otherwise unreviewable in a petition for review of the final judgment, the district court had jurisdiction to consider the petition for judicial review challenging it under NRS 233B.130(1). Accordingly, because the district court had jurisdiction and we conclude that the State Board's Equalization Order exceeds its statutory authority, we reverse the district court's order dismissing the petition for judicial review, and we remand this matter to the district court with instructions for it to grant the petition for judicial review, vacate the Equalization Order directing new appraisals, and conduct further proceedings to satisfy the requirements of NRS 361.395.

CHERRY, C.J., and DOUGLAS, GIBBONS, and PARRAGUIRRE, JJ., concur.

WILLIAM POREMBA, APPELLANT, *v.* SOUTHERN NEVADA PAVING; AND S&C CLAIMS SERVICES, INC., RESPONDENTS.

No. 66888

January 26, 2017 388 P.3d 232

Petition for en banc reconsideration of a panel opinion in an appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Petition granted; reversed and remanded with instructions.

Dunkley Law and *Mark G. Losee* and *Matthew S. Dunkley*, Henderson, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and *Daniel L. Schwartz* and *Jeanne P. Bawa*, Las Vegas, for Respondents.

Before the Court EN BANC.

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mandate of uniformity, and (2) the State Board was unlawfully constituted. For the same reason, we need not address the Bakst intervenors' arguments of issue and claim preclusion except as discussed above.

OPINION

By the Court, CHERRY, C.J.:

On April 7, 2016, a panel of this court issued an opinion reversing, remanding, and instructing the district court to remand the case to the appeals officer. After respondents petitioned for en banc reconsideration, we granted the petition. We now withdraw the April 7, 2016, opinion and issue this opinion in its place. On en banc reconsideration, we again reverse, remand, and instruct the district court to remand to the appeals officer, but we instruct the appeals officer to conduct a hearing consistent with this opinion.

NRS 616C.390(1) sets forth the required findings that compel reopening of a workers' compensation claim, none of which include the right of an insurer to reimbursement from an injured workers' third-party recovery. NRS 616C.215(2)(a), however, provides that when an injured employee who receives workers' compensation also recovers damages from the responsible party, the amount of workers' compensation benefits must be reduced by the amount of the damages recovered. We concluded in *Employers Insurance Co. of Nevada v. Chandler*, 117 Nev. 421, 426, 23 P.3d 255, 258 (2001), that an insurer may refuse to pay additional funds via reopening a workers' compensation claim until the claimant demonstrates that he or she has exhausted any third-party settlement funds and that medical expenses are considered to be compensation that an insurer may withhold until the recovery amount has been exhausted.

In the case now before us, it appears that the appeals officer and the district court resolved the petition to reopen based upon whether Poremba exhausted his settlement funds on medical expenses. That is erroneous for two reasons. First, NRS 616C.390 does not require exhaustion or reimbursement as a condition precedent to reopening a workers' compensation claim. Second, insurers, although entitled to reimbursement, are only entitled to reimbursement from the portions of third-party recovery allocated to expenses within the scope of workers' compensation. Accordingly, we hold that (1) an administrative officer, or in this case an appeals officer, must first reopen a workers' compensation claim based solely on the requirements contained within NRS 616C.390(1), then determine what, if any, reimbursement an insurer is entitled to before it must provide additional workers' compensation benefits; and (2) although an insurer may be entitled to reimbursement from the portion of settlement funds designated for expenses otherwise covered by workers' compensation, an insurer is not entitled to reimbursement from the portion of settlement funds designated to compensate the injured worker for

items outside the definition of "compensation" in NRS 616A.090, such as past, present, and future pain and suffering.

FACTS AND PROCEDURAL HISTORY

Appellant William Poremba worked for respondent Southern Nevada Paving as a construction driver. On July 22, 2005, in the course of his duty, Poremba was driving a truck when another driver struck the truck with his backhoe. Poremba suffered injuries to his head, neck, back, and knee. Poremba filed a workers' compensation claim, which Southern Nevada Paving, through respondent S&C Claims (collectively S&C), accepted. S&C eventually closed the claim, sending Poremba a letter with instructions on how to reopen the claim should his condition worsen.

Poremba also sued the backhoe driver and his employer. That lawsuit was settled on July 30, 2009, for $63,500, with a significant amount of that settlement paid directly to cover health-care providers' liens. Poremba personally received $34,631.51. He spent approximately $14,000 of the money he received on additional medical treatment. The settlement agreement, however, did not specify a structure as to how the funds were to be allocated.

Poremba attempted to return to work, but he was unable to do so. Additionally, his doctors instructed him not to go back to work. On January 10, 2013,[1] Poremba sought to reopen his claim, but S&C denied his request. Poremba administratively appealed, and S&C filed a motion for summary judgment, arguing that our decision in *Chandler* precluded Poremba from reopening his claim because he spent settlement funds on expenses other than medical costs. After an evidentiary hearing in which the appeals officer prevented Poremba from introducing evidence about the potential changed circumstances surrounding his injuries, the appeals officer summarily granted S&C summary judgment, again denying Poremba's attempt to reopen his claim. Poremba petitioned the district court for judicial review. The district court denied the petition, and this appeal followed.

DISCUSSION

Poremba asserts that the appeals officer erred in granting summary judgment because, legally, he is not required to prove that he spent his excess recovery on medical expenses and because factual issues exist as to whether his injury had worsened, necessitating additional compensation. S&C argues that *Chandler* "clearly stands for" the proposition that a claimant who receives a third-party settlement may not spend any of that money on home loans or family

[1]Poremba previously attempted to reopen his claim just over a year prior to January 2013. NRS 616C.390 requires a claimant to wait for a year before a subsequent attempt to reopen, and Poremba complied.

expenses and reopen his or her workers' compensation claim when his or her medical situation changes. S&C argues that the point is to prevent a double recovery, asserting that double recovery means simply to recover from two sources for the same injury. We disagree with S&C.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Although we defer to an agency's findings of fact, we review legal issues de novo, including matters of statutory interpretation. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). We defer to an agency's interpretations of its governing statutes or regulations only if the interpretation "is within the language of the statute." *Id.* (internal quotations omitted).

Workers' compensation provides specific benefits while personal injury recoveries may be designed not only to pay for special damages, such as loss of earnings and medical expenses, but to compensate for general or noneconomic damages such as pain and suffering and emotional distress. The critical inquiry for determining insurer reimbursement is not how an injured worker spends settlement funds, but how those settlement funds are allocated for various damages. We hold that workers' compensation insurers are not entitled to reimbursement from the portion of third-party settlement funds that do not fall within the definition of compensation found in NRS 616A.090. Moreover, before an administrative officer may even consider reimbursement, the officer must first make a finding pursuant to NRS 616C.390 as to whether the worker's claim must be reopened.

The administrative officer must make a finding pursuant to NRS 616C.390 before considering whether the insurer is entitled to any reimbursement

Reimbursement rules notwithstanding, the sole requirements for a claimant to reopen a workers' compensation claim are contained within NRS 616C.390:

> 1. If an application to reopen a claim to increase or rearrange compensation is made in writing more than 1 year after the date on which the claim was closed, the insurer *shall* reopen the claim if:
>
> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
>
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
>
> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

(Emphasis added.) NRS 616C.390 is silent as to funds that the claimant receives from any other source. *Id.*

Poremba waited the required year after his previous petition to reopen his claim. He submitted documentation from his treating physician stating that the original injury was the primary cause of the changed circumstances and that he needed an increase in compensation because of the changed circumstances. At the hearing, however, the appeals officer did not let Poremba testify or enter the documentation into evidence once she learned that Poremba spent settlement funds on nonmedical expenses. As a result, the appeals officer denied Poremba's petition.

Because the only factors required to compel reopening are found within NRS 616C.390 and the appeals officer failed to make any factual findings as to those factors, we must reverse and remand with instructions to remand to the appeals officer to determine whether Poremba qualifies to reopen his claim based solely on NRS 616C.390 before she considers whether S&C is entitled to reimbursement.

An insurer is not entitled to reimbursement from the portions of a third-party settlement that compensates an injured worker for anything outside the definition of compensation found in NRS 616A.090

Nevada law allows an insurer to claim an offset when the claimant receives money from a lawsuit against the party responsible for the injury. NRS 616C.215(2). In pertinent part, NRS 616C.215(2) provides as follows:

> 2. When an employee receives an injury for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS and which was caused under circumstances creating a legal liability in some person, other than the employer or a person in the same employ, to pay damages in respect thereof:
>
> (a) The injured employee . . . may take proceedings against that person to recover damages, but the amount of the compensation the injured employee . . . [is] entitled to receive pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, including any future compensation, must be reduced by the amount of the damages recovered . . . .
>
> (b) If the injured employee . . . receive[s] compensation pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS, the insurer . . . has a right of action against the person so liable to pay damages and is subrogated to the rights of the injured employee or of the employee's dependents to recover therefor.

For the purposes of workers' compensation insurance, however, " '[c]ompensation' means the money which is payable to an em-

ployee or to the dependents of the employee as provided for in chapters 616A to 616D, inclusive, of NRS, and includes benefits for funerals, accident benefits and money for rehabilitative services." NRS 616A.090.

Accident benefits include "medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatuses, including prosthetic devices." NRS 616A.035(1). Accident benefits do not include exercise equipment, gym memberships, or in most cases, motor vehicle expenses. NRS 616A.035(3). Medical benefits are defined virtually identically to accident benefits. *See* NRS 617.130.

In 2001, this court concluded that an insurer may withhold payment of medical benefits until the claimant has exhausted any funds received from a third-party settlement. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. Although *Chandler* did not limit how the claimant may exhaust the settlement funds, despite S&C's assertions to the contrary, the issue is not how the funds are exhausted, but which third-party claim for damages must be exhausted before a claimant may seek additional compensation. Accordingly, it is critical to allocate the settlement proceeds in order to determine the category for reimbursement to an insurer.

In *Chandler*, we held that "compensation," as specified in NRS 616C.215, included medical benefits. *Id*. It was not necessary to determine whether wage replacement, or any other type of specific payments, were to be excluded. We concluded that Chandler had to exhaust his settlement proceeds, but we did not decide how he had to exhaust those proceeds. *Id*.[2] We also did not discuss whether an insurer is entitled to reimbursement from all settlement funds or only the portion of those funds designated for expenses within the definition of compensation as found in NRS 616A.090. We take the opportunity to do so today.

When a person is injured, he or she may sue the responsible party for payment to cover a variety of costs. Restatement (Second) of Torts § 924 (Am. Law Inst. 1979). While medical treatment is certainly among those costs, a plaintiff may also recover damages for pain and suffering, lost wages if the defendant's actions prevented the plaintiff from working, and harm to property. *Id.* These damages include and exceed the compensation as defined in NRS 616A.090.

S&C is correct that the policy behind NRS 616C.215 is to prevent a double recovery. *Chandler*, 117 Nev. at 426, 23 P.3d at 258. S&C, however, mischaracterizes double recovery. Double recovery is characterized based not on the event necessitating the compensation, but on the nature of the compensation provided. S&C cites to

[2]In 2007, we again held that compensation, for the purposes of workers' compensation laws, includes medical benefits. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 177, 162 P.3d 148, 152 (2007). We did not limit the term "compensation" to medical benefits.

Tobin v. Department of Labor & Industries, 187 P.3d 780 (Wash. Ct. App. 2008), for the proposition that a claimant should not receive a double recovery as well. *Tobin*, however, explains that double recovery prevents the claimant from receiving compensation from the insurer and "retain[ing] the portion of damages which would include those same elements." 187 P.3d at 783 (internal quotations omitted). The *Tobin* court held that the insurer was only entitled to the portion of proceeds from the third-party suit that correlate to the benefits it provided as a worker's compensation insurer. *Id.* at 784. The *Tobin* court continued:

> [The insurer]'s position would give it an "unjustified windfall" at [the claimant]'s expense. Under [the insurer]'s interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. [*The insurer*] *did not, and will never, compensate* [*the claimant*] *for his pain and suffering, therefore it cannot be "reimbursed" from funds designated to compensate him for his pain and suffering*.

Id. (internal citations omitted) (emphasis added). Only one percent of Tobin's 1.4 million dollar settlement was allocated to future medical expenses, whereas over half of the settlement was allocated to pain and suffering. *Id.* at 781. The breakdown of Poremba's settlement, however, remains unclear and requires further fact-finding.

We agree with S&C insofar as a worker should not receive funds from two sources to pay for the same expenses. The worker, however, may spend settlement funds allocated for expenses beyond NRS 616A.090's definition of workers' compensation on those designated expenses without fear that the insurer will forever be able to deny or refuse to reopen claims for future expenses that are within the scope of workers' compensation.

We agree with the *Tobin* court and hold that because workers' compensation insurance never compensates the injured worker for pain and suffering, an insurer is not entitled to reimbursement from any of the settlement funds that were designated for pain and suffering, or any other expense beyond the scope of workers' compensation defined in NRS 616A.090. To deny a worker the opportunity to reopen his claims for future workers' compensation benefits because he properly used the portion of his settlement money designated for pain and suffering to feed himself and his family is patently unjust and not supported by the statute.

Accordingly, we conclude that while S&C may be entitled to an offset based on the settlement funds allocated for future medical expenses or other expenses within the scope of workers' compensation, it is not entitled to recover any portion of the settlement funds allocated for expenses beyond NRS 616A.090's definition of com-

pensation, such as pain and suffering. Because the record is silent as to how Poremba's settlement was to be allocated beyond the amount spent directly on then present medical expenses, the appeals officer must conduct an evidentiary hearing in which the parties may present evidence and call witnesses privy to the settlement proceedings so that the appeals officer can make a factual determination as to how the remainder of the settlement was to be allocated[3] and may only order reimbursement from the portion of the settlement allocated for expenses within the scope of workers' compensation. Going forward, parties can expressly designate how settlement funds are to be allocated so that future evidentiary hearings are not necessary.

Because Poremba's settlement likely covered expenses beyond the scope of compensation as found in NRS 616A.090, we must reverse the district court's denial of judicial review and instruct the district court to remand to the appeals officer for further proceedings consistent with this opinion.

The administrative officer must issue a decision containing detailed findings of fact and conclusions of law

Poremba argues that the district court erred when it found no improper procedure because Nevada statutes require the appeals officer's order to contain findings of fact and conclusions of law, and they were absent in the appeals officer's order. He further argues that without these findings, it is more difficult for a court to conduct a meaningful review. S&C does not refute Poremba's arguments, but merely suggests that if correct, the remedy would be a remand for a more detailed order. We conclude that after the appeals officer conducts the hearing to determine how Poremba's settlement was to be allocated, an order with detailed findings of fact and conclusions of law is required.

Without detailed factual findings and conclusions of law, this court cannot review the merits of an appeal; thus, administrative agencies are required to issue orders that contain factual findings and conclusions of law. NRS 233B.125. In pertinent part, the statute reads:

> A decision or order adverse to a party in a contested case *must* be in writing or stated in the record. . . . [A] final decision *must include findings of fact and conclusions of law, separately stated*. Findings of fact and decisions *must* be based upon substantial evidence. Findings of fact, if set forth in statutory

[3]Specifically, the appeals officer must determine how much of the settlement was designated for:

- Medical expenses, both past and future;
- Wage loss, both past and future;
- Pain and suffering, past, present, and future; and
- Any other expense contemplated at the time of the settlement.

> language, *must* be accompanied by a concise and explicit statement of the underlying facts supporting the findings.[4]

Id. (emphases added). Each and every clause in this statute contains mandatory instruction for the appeals officer, leaving no room for discretion.

Here, not only did the appeals officer fail to issue detailed findings of fact or conclusions of law, the appeals officer precluded Poremba from introducing evidence supporting reopening his case after he admitted that he spent settlement money on expenses beyond medical treatment. This illustrates that the appeals officer had the same mistaken impression of the law as do the insurers. Therefore, not only did the appeals officer err when she failed to comply with NRS 233B.125's mandate for detailed findings and conclusions, but because she prevented Poremba from presenting the required evidence, pursuant to NRS 616C.390, to reopen his claim, we are unable to review the facts in this appeal. Accordingly, we must reverse and remand for a full administrative hearing and subsequent order containing detailed findings of fact and conclusions of law as to whether Poremba meets the requirements of NRS 616C.390 and, if so, how much of an offset S&C may claim based on the amount of settlement funds that were designed to compensate for expenses within NRS 616A.090's definition of compensation.

CONCLUSION[5]

Accordingly, the judgment of the district court is reversed, and we remand to the district court with instructions to remand to the appeals officer for a new hearing and determination, consistent with this opinion.[6]

Douglas, Gibbons, Pickering, Hardesty, and Parraguirre, JJ., concur.

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[4]This statute was amended in 2015 and changed the standard from "substantial evidence" to "a preponderance of the evidence." 2015 Nev. Stat., ch. 160, § 7, at 708. This change does not affect this opinion.

[5]Poremba argued that the appeals officer improperly revived S&C's motion for summary judgment. Because we conclude both that the insurer may not seek reimbursement from the portion of the settlement funds allocated for expenses beyond the limited scope of workers' compensation and that the appeals officer's order must contain detailed factual findings and conclusions of law, we decline to address this issue.

[6]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

SATICOY BAY LLC SERIES 2021 GRAY EAGLE WAY, APPELLANT, *v.* JPMORGAN CHASE BANK, N.A., RESPONDENT.

No. 68431

January 26, 2017 388 P.3d 226

Appeal from a district court order dismissing a complaint in intervention. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Vacated and remanded with instructions.

Law Offices of Michael F. Bohn, Esq., Ltd., and *Michael F. Bohn*, Las Vegas, for Appellant.

Smith Larsen & Wixom and *Chet A. Glover* and *Kent F. Larsen*, Las Vegas, for Respondent.

Before HARDESTY, PARRAGUIRRE and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we determine whether the district court properly dismissed a complaint in intervention with prejudice when it dismissed the original action for failure to prosecute pursuant to NRCP 41(e). We conclude that, while dismissal of the complaint in intervention was mandatory under NRCP 41(e), the district court abused its discretion in dismissing the complaint in intervention with prejudice.

FACTS AND PROCEDURAL HISTORY

This appeal involves the dismissal of an action contesting ownership of real property consisting of three separate lots: Lot 21, Lot 22, and Lot 26 (the Property) in Las Vegas. Appellant Saticoy Bay LLC Series 2021 Gray Eagle Way (Saticoy) allegedly obtained title to the Property by way of a homeowner association foreclosure deed on Lots 21 and 26 recorded on August 26, 2013, and a quitclaim deed from the same homeowner association on Lot 22 recorded on December 3, 2013. On September 5, 2012, respondent JPMorgan Chase Bank, N.A. (JPMorgan) was assigned the beneficial interest of a deed of trust recorded against the Property on January 4, 2007.

On April 20, 2009, the Canyon Gate Master Association's (CGMA) foreclosure agent recorded a notice of delinquent assessment lien against Lots 21, 22, and 26. On September 8, 2009, CGMA recorded a notice of default and election to sell Lots 21, 22,

and 26. On December 15, 2009, Susan Louise Hannaford filed a complaint against CGMA challenging an arbitration award relating to the Property.

On May 23, 2013, CGMA recorded a notice of foreclosure sale of Lots 21 and 26 and scheduled the sale for July 18, 2013. Saticoy appeared at the foreclosure sale and purchased Lots 21 and 26. On August 5, 2013, Saticoy moved to intervene in the action initiated by Hannaford's complaint. The motion was unopposed, and the district court entered an order granting the motion. On September 30, 2013, Saticoy filed its complaint in intervention seeking injunctive relief, quiet title, declaratory relief, and issuance of a writ of restitution.

On October 18, 2013, CGMA recorded a notice of foreclosure sale of Lot 22. CGMA purchased Lot 22 at the foreclosure sale on November 21, 2013. Saticoy purportedly purchased Lot 22 from CGMA by way of a quitclaim deed recorded December 3, 2013.

On November 6, 2014, JPMorgan filed an answer to Saticoy's complaint in intervention. On March 17, 2015, the district court entered an order to show cause directing the parties to show why the action should not be dismissed pursuant to NRCP 41(e) for failure to bring the action to trial within five years after Hannaford's complaint was filed. At the show cause hearing, the district court determined that the action should be dismissed, but requested that the parties brief the issue of whether the dismissal should be with or without prejudice. After briefing was completed, the district court entered an order dismissing Hannaford's complaint and Saticoy's complaint in intervention with prejudice, finding that (1) neither Hannaford nor Saticoy had "taken affirmative steps to adequately prosecute [the] case," (2) Saticoy's "excuse that it intervened only nineteen months [before the date of the order to show cause was] an inadequate excuse for delay," (3) Saticoy's case lacks merit, and (4) NRS 116.3116(6)'s[1] three-year limitation period for foreclosing an HOA lien had run. Saticoy appeals the district court's decision.

DISCUSSION

Mandatory dismissal under NRCP 41(e) includes complaints in intervention brought in an original action

Under NRCP 41(e), "[a]ny action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced . . . unless such action is brought to trial within 5 years after the plaintiff has filed the action." The district court does not have discretion to dismiss an action pursuant to NRCP 41(e).

[1]In 2015, the Legislature amended NRS Chapter 116. *See* 2015 Nev. Stat., ch. 266, § 1, at 1331-45. Those amendments became effective October 1, 2015. Any discussion in this opinion related to those statutes refers to the 2013 statutes in effect at the time the district court made its decision in June 2015.

Johnson v. Harber, 94 Nev. 524, 526, 582 P.2d 800, 801 (1978). We have previously explained that

> NRCP 41(e) gives five years for a trial of an "action", not of a "claim." Unlike a claim, an action includes the original claim and any crossclaims, counterclaims, and third-party claims . . . . Thus, the original claim and any crossclaims, counterclaims and third-party claims are all part of one "action."

United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Manson, 105 Nev. 816, 820, 783 P.2d 955, 957-58 (1989).

We have not, however, decided whether complaints in intervention filed in the original action fall into the *Manson* framework. Thus, as a preliminary issue in this case, we must first address whether complaints in intervention are part of the original action for purposes of NRCP 41(e)'s mandatory dismissal.

NRCP 24 is instructive in deciding whether a complaint in intervention is part of the original action for purposes of NRCP 41(e). NRCP 24, which governs complaints in intervention, permits parties, under certain circumstances, "to intervene in an *action*." NRCP 24(a)-(b) (emphasis added). Similarly, this court has treated parties in intervention under NRCP 24 as intervenors in the original action. *See Las Vegas Police Protective Ass'n Metro., Inc. v. Eighth Judicial Dist. Court*, 122 Nev. 230, 239, 130 P.3d 182, 189 (2006) ("Generally, an intervenor is afforded all the rights of a party to the action . . . ." (internal quotation marks omitted)); *Estate of LoMastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1067-68, 195 P.3d 339, 345 (2008) ("[W]hen an intervenor intervenes, it is bound by all prior orders and adjudications of fact and law as though [it] had been a party from the commencement of the suit." (second alteration in original) (internal quotation marks omitted)).

The practice of treating complaints in intervention as part of the original action is also typical in other jurisdictions. *See, e.g.*, *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); *Conseco v. Wells Fargo Fin. Leasing, Inc.*, 204 F. Supp. 2d 1186, 1193 (S.D. Iowa 2002) ("A party, once allowed to intervene, may litigate fully as if it were an original party."); *Taylor-West Weber Water Improvement Dist. v. Olds*, 224 P.3d 709, 712 (Utah 2009) (holding that third-party intervenors have the same status as original parties); *see also* 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1920, at 609 (3d ed. 1998) ("Unless conditions have been imposed, the intervenor is treated as if the intervenor were an original party . . . .").

Thus, we conclude that complaints in intervention are part of the original action for purposes of mandatory dismissal under NRCP

41(e). Because Saticoy failed to timely prosecute its claims in intervention, dismissal was mandatory.

The district court's dismissal of Saticoy's complaint in intervention with prejudice, however, was an abuse of discretion

"A district court has broad, but not unbridled, discretion in determining whether dismissal under NRCP 41(e) should be with or without prejudice." *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 102-03, 158 P.3d 1008, 1012 (2007). The parties agree that the district court acted within its discretion when it dismissed Hannaford's claims with prejudice. Thus, we only consider whether the district court abused its discretion when it dismissed Saticoy's complaint in intervention with prejudice.

Saticoy argues that the district court abused its discretion because it failed to properly apply the *Monroe* factors relevant to a determination of dismissal with or without prejudice. Under *Monroe*, "[f]actors relevant to the district court's exercise of that discretion include the underlying conduct of the parties, whether the plaintiff offers adequate excuse for the delay, whether the plaintiff's case lacks merit, and whether any subsequent action following dismissal would not be barred by the applicable statute of limitations." *Id*. at 103, 158 P.3d at 1012 (footnote omitted). We will defer to the district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence. *See Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). We review the district court's legal conclusions de novo. *Id*.

Conduct of the parties and adequacy of excuse for delay

The district court decided to dismiss with prejudice, in part, because it found that Saticoy had not taken adequate steps to prosecute its claims, and it offered no adequate excuse for delay. We disagree.

We have stated that "[t]he duty rests upon the plaintiff to use diligence and to expedite his case to a final determination." *Moore v. Cherry*, 90 Nev. 390, 395, 528 P.2d 1018, 1021 (1974). However, "[b]ecause the law favors trial on the merits, . . . dismissal with prejudice may not be warranted where . . . delay is justified by the circumstances of the case." *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993). In deciding whether circumstances justify dismissal with prejudice, we consider "the conduct and good faith belief of the parties." *Id*. The circumstances of this case are such that dismissal with prejudice is not warranted.

Saticoy purportedly acquired its interest in Lots 21 and 26 of the Property at the foreclosure sale held in July 2013. Saticoy promptly filed a motion to intervene in August 2013 and filed its complaint in intervention on September 30, 2013. JPMorgan filed an answer to Saticoy's complaint over a year later on November 6, 2014. Thus,

Saticoy held its interest in the Property for 17 months, had been a party to the action for less than 15 months, and was served with JPMorgan's answer 40 days before the five-year limitation period expired. We conclude that Saticoy's conduct demonstrates that it took adequate steps to prosecute its action, and any delay was justified by the circumstances of the case.

The district court misapplied NRS 116.3116(6) to the merits of Saticoy's claims

A district court may consider the merits of the claims when it exercises its discretion in deciding whether to dismiss with prejudice. *Monroe*, 123 Nev. at 102-03, 158 P.3d at 1012. Here, the district court found that Saticoy's case lacked merit based on its application of a three-year limitation period extinguishing unpaid assessment liens in NRS 116.3116(6).[2]

NRS 116.3116(6) provides that "[a] lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due." NRS 116.3116(1) provides that an HOA has a lien for assessments against its homeowner's residence at the time the assessments become due and, if the assessment is payable in installments, the HOA has a lien for the full amount of the assessment when the first installment is due. Under NRS 116.3116(5), the HOA's lien is perfected when its declaration is recorded and "[n]o further recordation of any claim of lien for assessment . . . is required." Here, the parties do not dispute that CGMA had a valid lien for assessments against the Property. The question is whether that lien was extinguished by the three-year limitation period in NRS 116.3116(6). To resolve this issue, we must determine what action is sufficient to meet the requirement of instituting "proceedings to enforce the lien."[3]

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), we interpreted the phrase "institution of an action to enforce a lien" contained in NRS 116.3116(2). Citing *Black's Law Dictionary*, 719, 869 (9th ed. 2009), we noted that "institution" has been broadly defined as "[t]he commencement of something, *such as* a civil or criminal action" and that "foreclosure proceedings

[2]In 2015, the Legislature changed the required action an HOA must take under the three-year limitation period for foreclosing a lien for unpaid assessments. 2015 Nev. Stat., ch. 266, § 1, at 1335. Under the current statute, an HOA's lien is extinguished unless an HOA records a notice of default and election to sell or institutes judicial proceedings to enforce its lien within three years after the full amount of the assessments becomes due. NRS 116.3116(10) (2015).

[3]We acknowledge that a determination must also be made as to when "the full amount of assessments becomes due" pursuant to NRS 116.3116(6). However, the district court did not explicitly find, and the record does not reflect, when the full amount of assessments became due in this case. Thus, we do not address that issue here.

are 'instituted' and include both 'judicial foreclosure' and 'nonjudicial foreclosure' methods." *Id*. at 751-52, 334 P.3d at 415 (alteration in original) (internal quotation marks omitted). Thus, for purposes of NRS 116.3116(6), the focus must be on the commencement of proceedings to enforce a lien. The procedure for foreclosure of liens is provided in NRS 116.31162-.31164. Under NRS 116.31162(1), an HOA may foreclose its lien by sale only after it takes certain steps. First, the HOA must provide to the homeowner a "notice of delinquent assessment which states the amount of the assessments and other sums which are due . . . , a description of the unit against which the lien is imposed and the name of the record owner of the unit." NRS 116.31162(1)(a). Not less than 30 days after the HOA provides the notice of delinquent assessment, the HOA must record a notice of default and election to sell the unit to satisfy the lien. NRS 116.31162(1)(b). Finally, the HOA must give the homeowner a 90-day grace period following the recording of the notice of default and election to sell before it continues foreclosure proceedings. NRS 116.31162(1)(c).

Under the foreclosure statutes, no action can be taken unless and until the HOA provides a notice of delinquent assessments pursuant to NRS 116.31162(1)(a). As such, a party has instituted "proceedings to enforce the lien" for purposes of NRS 116.3116(6) when it provides the notice of delinquent assessment. This interpretation conforms to our decision in *SFR*, where we stated that "[t]o initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments." 130 Nev. at 746, 334 P.3d at 411. This also conforms to a December 12, 2012, Nevada Real Estate Division of the Department of Business and Industry (NRED) advisory opinion we cited favorably in *SFR*. *Id*. at 754-55, 334 P.3d at 416-17. Under NRS 116.623(1)(a), NRED is tasked with issuing "advisory opinions as to the applicability or interpretation of . . . [a]ny provision of this chapter." In its advisory opinion, NRED stated that

> NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. This process is started by the mailing of a notice of delinquent assessment as provided in NRS 116.31162(1)(a) . . . . The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2).

13-01 Op. NRED, 17-18 (2012).

The district court mischaracterized NRS 116.3116(6) as a statute of limitations. NRS 116.3116(6) does not operate as a statute of limitations, but instead determines the expiration of past due assess-

ments. NRS 116.3116(6) limits the amount of unpaid assessments upon which an HOA can foreclose to those that have become due within three years of the HOA instituting proceedings to enforce its lien. Therefore, we conclude that the district court incorrectly relied on NRS 116.3116(6) when it found that Saticoy's claims lack merit.

Saticoy's subsequent action is not barred by the applicable statute of limitations

The district court erred in concluding that Saticoy could not refile a subsequent action following dismissal. Such action would be a complaint for quiet title to have its rights determined on the merits and would be governed by NRS 11.080. NRS 11.080 provides for a five-year statute of limitations for a quiet title action beginning from the time the "plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question." Saticoy did not acquire its interest in the Property until it purchased Lots 21 and 26 at the HOA foreclosure sale held in 2013. Therefore, the statute of limitations for a quiet title action under NRS 11.080 will not run until July 2018.

CONCLUSION

We conclude that Saticoy's complaint in intervention was part of the original action for purposes of NRCP 41(e), and thus, dismissal of its complaint was mandatory. However, we conclude that the district court abused its discretion when it dismissed Saticoy's complaint in intervention with prejudice because Saticoy took adequate steps to prosecute its action, any delay was justified, its claims do not lack merit based on a proper application of NRS 116.3116(6), and a subsequent action would not be barred by the applicable statute of limitations. We therefore vacate the district court's order dismissing Saticoy's complaint in intervention with prejudice and remand this matter to the district court with instructions for it to enter an order dismissing Saticoy's complaint in intervention without prejudice pursuant to NRCP 41(e).

PARRAGUIRRE and PICKERING, JJ., concur.

SATICOY BAY LLC SERIES 350 DURANGO 104, Appellant, *v.* WELLS FARGO HOME MORTGAGE, a Division of Wells Fargo Bank, N.A., Respondent.

No. 68630

January 26, 2017 388 P.3d 970

Appeal from a district court order granting a motion to dismiss in a quiet title action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and remanded.

Kim Gilbert Ebron and *Jacqueline A. Gilbert*, Las Vegas; *Law Offices of Michael F. Bohn, Esq., Ltd.*, and *Michael F. Bohn*, Las Vegas, for Appellant.

Snell & Wilmer, LLP, and *Andrew M. Jacobs* and *Kelly H. Dove*, Las Vegas, for Respondent.

Before the Court En Banc.[1]

OPINION

By the Court, Parraguirre, J.:

NRS 116.3116-.31168[2] grant a homeowners' association (HOA) a superpriority lien for certain unpaid assessments and allow an HOA to nonjudicially foreclose on such a lien if specific requirements are met. In this appeal, we must determine whether these statutes violate a first security interest holder's due process rights. We hold that neither the HOA's nonjudicial foreclosure, nor the Legislature's enactment of the statutes, constitute state action. Therefore, the statutes do not implicate due process. Additionally, we consider whether the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure violates the Takings Clauses of the United States and Nevada Constitutions. We hold it does not, and we therefore reverse the district court's order and remand for further proceedings consistent with this opinion.

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[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter. The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

[2]Any discussion in this opinion related to these statutes refers to the statutes in effect prior to the Legislature's 2013 and 2015 amendments. *See Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 364 n.2, 373 P.3d 66, 67 n.2 (2016) (referring to the statutes in effect at the time the underlying cause of action arose).

FACTS AND PROCEDURAL HISTORY

Nonparties to this appeal, Roy and Shirley Senholtz, took out an $81,370 loan from respondent Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. (Wells Fargo), in order to refinance their mortgage on property located in Summerlin, Nevada. Wells Fargo's loan was secured by a deed of trust on the property, and the property was governed by an HOA's covenants, conditions, and restrictions (CC&Rs). The Senholtzes subsequently failed to pay their HOA dues and mortgage, and both Wells Fargo and the HOA recorded notices of default and election to sell. Thereafter, the HOA conducted a nonjudicial foreclosure sale, wherein the property was sold to appellant Saticoy Bay LLC Series 350 Durango 104 (Saticoy Bay) for $6,900.

Saticoy Bay filed a complaint seeking an injunction preventing Wells Fargo from foreclosing on the property and a declaration that it was the rightful owner of the property, free and clear from any encumbrances or liens. Wells Fargo filed a motion to dismiss, arguing (1) NRS 116.3116 *et seq.* violate the Due Process Clause and the Takings Clause of both the United States and Nevada Constitutions; (2) this court's interpretation of NRS 116.3116 *et seq.* in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), conflicts with public policy; and (3) the purchase price of the property was commercially unreasonable. The district court held that the statutes violated Wells Fargo's due process rights and granted the motion; the district court did not address Wells Fargo's other arguments. Saticoy Bay now appeals the district court's order.

DISCUSSION

On appeal, Saticoy Bay argues the foreclosure statutes do not violate a first security interest holder's due process rights. We also consider Wells Fargo's argument that the foreclosure statutes violate the Takings Clauses of the United States and Nevada Constitutions. *See Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 798, 358 P.3d 234, 238-39 (2015) ("Although this court would not normally address an issue that the district court declined to consider and develop the factual record, this court can consider constitutional issues for the first time on appeal."). We review the district court's legal conclusions, such as the constitutionality of a statute, de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

Nevada's superpriority lien statutes do not violate a first security interest holder's due process rights

Wells Fargo argues that the foreclosure procedures specified in NRS 116.3116 *et seq.* are facially unconstitutional because they do

not require an HOA to give a first security interest holder actual notice of a foreclosure that, once conducted, may extinguish the security interest. *Cf. SFR Investments Pool 1*, 130 Nev. at 758, 334 P.3d at 419 ("NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust."). Saticoy Bay argues that an HOA's nonjudicial foreclosure does not violate due process because (1) no state actor participates in an HOA's nonjudicial foreclosure, and (2) NRS 116.31168 incorporates the notice requirements set forth in NRS 107.090.

The Due Process Clauses of the United States and Nevada Constitutions protect individuals from state actions that deprive them of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The United States Supreme Court has provided a two-part test for determining whether the deprivation of a property interest is the result of state action. *See Lugar*, 457 U.S. at 937. First, it must be determined whether "the deprivation [was] caused by the exercise of some right or privilege created by the State." *Id.* Second, it must be determined whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor."[3] *Id.*

The State created the HOA's superpriority lien, as well as its right to conduct a nonjudicial foreclosure upon default. *See* NRS 116.3116 *et seq.* In addition, Wells Fargo's security interest was extinguished because the HOA exercised its statutory right to conduct a nonjudicial foreclosure. Therefore, the first element of the *Lugar* test is satisfied. However, it must still be determined whether "the party charged with the deprivation" may be characterized as a state actor.

We conclude that an HOA acting pursuant to NRS 116.3116 *et seq.* cannot be deemed a state actor. The United States Supreme Court has held that "[a]ction by a private party pursuant to [a] statute, *without something more*, [is] not sufficient to justify a characterization of that party as a 'state actor.'" *Lugar*, 457 U.S. at 939 (emphasis added); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."). Several courts have recognized "that nonjudicial foreclosure statutes do not involve significant state action" so as to implicate due process. *See*

[3]We note that the parties have not argued that Nevada's Due Process Clause provides more protection than its federal counterpart. In addition, we have previously relied on federal precedent in determining the scope of Nevada's Due Process Clause. *See Hernandez v. Bennett-Haron*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012) ("[T]he similarities between the due process clauses contained in the United States and Nevada Constitutions . . . permit us to look to federal precedent for guidance . . . .") Therefore, we employ the *Lugar* test to determine whether the deprivation of a property interest is the result of state action under both the state and federal Due Process Clauses.

Charmicor, Inc. v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978) (holding that Nevada's nonjudicial foreclosure procedures regarding a deed of trust do not amount to state action); *see also Levine v. Stein*, 560 F.2d 1175, 1176 (4th Cir. 1977) (same with regard to Virginia's nonjudicial foreclosure procedures); *see also Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 28-29 (6th Cir. 1975) (finding no state action in a nonjudicial foreclosure, notwithstanding the fact that the sheriff conducted the foreclosure and the deed had to be registered with the county).

Additionally, we reject Wells Fargo's argument that the Legislature may be charged with the deprivation because it enacted NRS 116.3116 *et seq*. As stated previously, the first prong of the *Lugar* test identifies whether the state created a right or privilege that caused the deprivation. However, once this inquiry is satisfied, the analysis shifts to whether the procedures enacted by the state involve some form of government action. *See Lugar*, 457 U.S. at 941 (holding "the procedural scheme created by the statute [was] obviously [ ] the product of state action," but that due process was only implicated because state officials were involved in the seizure of the disputed property); *see also Apao v. Bank of New York*, 324 F.3d 1091, 1095 (9th Cir. 2003) (holding a mortgagee's nonjudicial foreclosure did not constitute state action because there was no "overt official involvement" in the enforcement of the creditor's remedy).

Although the two parts of the *Lugar* test may "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," *Lugar*, 457 U.S. at 937, this is not such a case. Rather, we find the present matter analogous to *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In *Flagg Bros.*, the respondent was evicted from her home, and her property was stored with the petitioner, a private warehouseman. *Id.* at 153. A state statute granted the petitioner a lien on the property and the right to enforce the lien by private sale of the property. *Id.* at 151 & n.1. The respondent argued that such a sale would be attributable to the state because the state had enacted the statute. *Id.* at 164. The United States Supreme Court held that, although the state had enacted the statute, due process was not implicated because the statute did not compel such a sale, and the state was not otherwise involved in such a sale. *Id.* at 157, 166.

Given this federal precedent, the Legislature's mere enactment of NRS 116.3116 does not implicate due process absent some additional showing that the state compelled the HOA to foreclose on its lien, or that the state was involved with the sale.[4] Neither has

[4]This is true regardless of whether the deprivation is alleged to have occurred at the time of foreclosure, when Wells Fargo's security interest was extinguished by the sale, or at the time the statutes were enacted, when HOA liens were made prior to first security interests on the property.

been demonstrated here. *See* NRS 116.31162(1) (stating that an HOA "may foreclose its lien by sale"); *see also* NRS 116.3116(6) (stating that the establishment of a superpriority lien "does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure"). Therefore, we hold that Nevada's superpriority lien statutes do not implicate due process.[5] To the extent this court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 754-55, 334 P.3d 408, 417-18 (2014), suggests otherwise, we clarify that due process is not implicated in an HOA's nonjudicial foreclosure. As such, we need not determine whether NRS 116.3116 *et seq.* incorporates the notice requirements set forth in NRS 107.090.

The extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure does not constitute a governmental taking

Wells Fargo argues that NRS 116.3116 *et seq.* effectuate an unconstitutional governmental taking because the state authorized the HOA to destroy its property interest. Saticoy Bay argues that Wells Fargo acquired its property interest subject to the HOA's superpriority lien because both NRS 116.3116 and the HOA's CC&Rs predate Wells Fargo's property interest.

The Takings Clauses of the United States and Nevada Constitutions prohibit the state from taking private property for public use without just compensation. U.S. Const. amend. V; Nev. Const. art. 1, § 8(6); *see also Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-41 (1897) (incorporating the Fifth Amendment's Takings Clause against the states through the Fourteenth Amendment's Due Process Clause). There are two ways in which the state may effectuate a "taking": (1) through a "direct government appropriation or physical invasion of private property"; or (2) through enacting a regulation that is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *see also McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1121-22 (2006).

Here, the state has not directly appropriated Wells Fargo's lien, nor has it directly appropriated the property subject to Wells Fargo's lien. *Cf. Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) (holding that the federal government effectuated a Fifth Amendment taking when it took title to property subject to the petitioner's liens, thereby rendering the liens unenforceable and valueless). In addition, Wells Fargo's intangible property interest is not subject to ac-

[5]We acknowledge that the Ninth Circuit has recently held that the Legislature's enactment of NRS 116.3116 *et seq*. does constitute state action. *See Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1159-60 (9th Cir. 2016). However, for the aforementioned reasons, we decline to follow its holding.

tual physical invasion. Therefore, we address whether the enactment of the foreclosure statutes constitutes a regulatory taking.

In determining whether a regulation constitutes a compensable regulatory taking, this court considers the following factors: "(1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action."[6] *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

First, the foreclosure statutes do not necessarily have an economic impact on any given first security interest holder. It is true that the statutes permit an HOA to foreclose on its lien. Nonetheless, the statutes do not require an HOA to conduct a foreclosure upon default, and if the HOA chooses to foreclose on its lien, the proceeds from the sale may fully satisfy the amount owed to a first security interest holder. *See* NRS 116.31164(3)(c) (stating the proceeds from such a sale shall be applied to subordinate claims after the HOA's lien is satisfied).

Second, even assuming that the foreclosure statutes had a substantial economic impact on Wells Fargo's property interest, the statutes did not interfere with any legitimate investment-backed expectation. NRS 116.3116 was enacted in 1991, *see* 1991 Nev. Stat., ch. 245, §§ 100-104, at 567-71, and the HOA's declaration of CC&Rs was recorded in 1994. Wells Fargo acquired its security interest in 2003. Therefore, Wells Fargo "was on notice that by operation of the statute, the [earlier recorded] CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust." *SFR Investments Pool 1*, 130 Nev. at 756, 334 P.3d at 418 (alterations in original) (internal quotation marks omitted); *see also* NRS 116.3116(4) ("Recording of the declaration constitutes record notice and perfection of the lien.").

Lastly, the "character of the government action" is as follows: the State statutorily altered the priority of certain liens. The state did

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[6]We note that the foreclosure statutes do not fall within the "two relatively narrow categories" of "regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle*, 544 U.S. at 538; *accord Sisolak*, 122 Nev. at 662-63, 137 P.3d at 1122. Specifically, the foreclosure statutes do not require a landowner to suffer "a permanent physical occupation" of his or her property, *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 426 (1982) (holding a New York statute that required a landlord to "permit a cable television company to install its cable facilities upon his property" constituted a taking); nor do they completely "deprive[ ] a landowner of all economically beneficial uses" of his or her land, *cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018, 1006-07, 1029-30 (1992) (holding a South Carolina statute that prohibited the "petitioner from erecting any permanent habitable structures" on his land constituted a taking to the extent that "background principles of nuisance and property law" did not independently restrict the landowner's intended use of the property).

not physically invade any property interest, nor did it participate in the HOA's nonjudicial foreclosure. *See Penn Cent.*, 438 U.S. at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (internal citation omitted)).

Wells Fargo does not cite, and we have not found, a single case that has held a state may not statutorily alter the priority of liens unless it compensates subsequent lienholders whose interests are diminished or destroyed as a result.[7] *See U.S. Bank, Nat'l Ass'n v. NV Eagles, LLC*, No. 2:15-CV-00786-RCJ-PAL, 2015 WL 5210523, at *5 (D. Nev. Sept. 3, 2015) ("The destruction of an undersecured junior lien via the foreclosure of a senior lien under priority rules published before the junior lienor took his lien has never been held to implicate the Takings Clause to this Court's knowledge."). Therefore, we hold that the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure does not constitute a governmental taking.

CONCLUSION

We hold that the Due Process Clauses of the United States and Nevada Constitutions are not implicated in an HOA's nonjudicial foreclosure of a superpriority lien. In addition, we hold that the extinguishment of a subordinate deed of trust through an HOA's nonjudicial foreclosure does not violate the Takings Clauses of the United States and Nevada Constitutions. Because the district court did not address Wells Fargo's other arguments, we remand the matter so that the district court may consider them in the first instance. Accordingly, we reverse the district court's order and remand the matter for further proceedings consistent with this opinion.

CHERRY, C.J., and DOUGLAS, GIBBONS, and HARDESTY, JJ., concur.

[7]We note that Wells Fargo did not acquire its property interest *prior to* the enactment of NRS 116.3116 *et seq*. Therefore, we need not address whether the foreclosure statutes effectuate a taking with respect to such lienholders.